United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1271

To be argued by
IRA H. BLOCK

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1271

UNITED STATES OF AMERICA,
Appellee,

—v.—

ANDRES ROMAN,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

IRA H. BLOCK,
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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1271

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANDRES ROMAN,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Andres Roman appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on June 30, 1975 after a one day trial before Honorable Kevin Thomas Duffy, United States District Judge, sitting without a jury.

Indictment 73 Cr. 977, filed October 19, 1973, charged Roman in one count with possessing with intent to distribute Schedule I and II narcotic drug controlled substances in violation of 21 U.S.C. §§ 812, 841(a)(1) and 841(b)(1)(A).

Trial commenced on November 11, 1974 and was adjourned until December 2, 1974, when an evidentiary hearing was held on Roman's motion to dismiss the indictment

on the ground that the Government had failed to furnish to the defense possibly exculpatory material in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963).

In an opinion filed June 2, 1975, Roman's *Brady* motion was denied, and he was found guilty as charged. On June 30, 1975, Judge Duffy suspended imposition of sentence, and Roman was placed on probation for a period not to exceed two years.

Statement of Facts

The Government's Case

The Government's case against Roman arose out of a narcotics investigation conducted by the New York Joint Task Force. As part of this investigation, Don Sturn, a special agent of the Bureau of Narcotics and Dangerous Drugs acting in an undercover capacity, visited Apartment 15-16, 1980 Second Avenue, New York, New York (in which Roman resided) on six occasions between May 2 and June 12, 1973 to negotiate with Ignacia Rosario, Domingo Rosario and Carolyn Baxter for the purchase of heroin. On three of these visits Roman was seen in the apartment by Sturn. During a visit on June 5, 1973, Roman volunteered that he had a good connection and offered to supply Sturn with one-eighth of a kilogram of heroin. Thereafter, a "no knock" warrant was obtained authorizing search of the premises based upon an affidavit from Sturn as to the events and circumstances he had observed during his visits to the apartment. (Tr. 83-87).*

On the morning of June 14, 1973, agents of the New York Joint Task Force executed the search warrant for the premises at Apartment 15-16. The warrant

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* "Tr." refers to the trial transcript; "Br." refers to appellant's brief; "A." refers to appellant's appendix.

directed the executing agents to search for and seize "narcotic drugs, cutting material and paraphenalia" which they found on the premises. Pursuant to the warrant, among other things, the agents seized from the apartment various quantities of narcotics (cocaine, heroin, and methadone) and marijuana, related materials commonly used in narcotics distribution (a jar of lactose, a small scale, a measuring spoon, a strainer, four bottles of marquis reagents and 700 small glassine envelopes), as well as sums of U.S. currency. Included among the seized contraband was a tinfoil ball containing approximately 3.6 grams of cocaine wrapped in six small tinfoil packets and a plastic bottle containing about 13.2 grams of cocaine in seventeen tinfoil packets. The tinfoil ball and plastic bottle were found on a night stand next to the bed in which Roman had been sleeping when the agents entered the apartment. Forty-one glassine envelopes containing heroin and a gold case containing marijuana were also found by the agents in a bureau drawer in that bedroom. (Tr. 12-33, 36-37).

Immediately after seizing the tinfoil ball and plastic bottle from the night stand in Roman's bedroom, one of the searching agents, Detective Michael Spataro, placed Roman under arrest and advised him of his constitutional rights. After acknowledging that he understood his rights, Roman responded to Detective Spataro's inquiry as to the ownership of the seized material by stating that it belonged to him. Thereafter, the agents' search of the apartment continued, and the other contraband and related paraphenalia previously referred to were uncovered in Roman's bedroom and in other parts of Apartment 15-16. As the search party was preparing to leave the apartment with Roman and his common law wife, Ignacia Rosario, in custody, Roman reiterated that the narcotics and other items seized from the apartment were his. This statement was made in the presence of Ignacia Rosario, and she verified to the agents the accuracy of Roman's admission. (Tr. 60-63, 67-70).

The Defense Case

Roman did not testify in his own behalf. The sole witness called by the defense was a police officer, Kevin Daly, who, over the Government's objection, was permitted to testify to a statement made by one Domingo Rosario, the son of Ignacia Rosario, at the time of his arrest that his mother "had nothing to do . . . whatever" with the narcotics and other materials seized in his (Domingo's) apartment and that the contraband belonged to him.* (Tr. 107-108).

ARGUMENT

The District Court Properly Found That Roman Possessed The Narcotics.

The sole issue presented by this appeal is whether there was sufficient evidence in the record below for the trial judge to find that Roman possessed the drugs seized from his apartment pursuant to the search warrant. However, rather than confronting this issue directly, Roman urges instead that the judgment below should be reversed because the trial court's opinion fails to discuss certain evidence presented by the defense which is claimed to be critical on the issue of Roman's guilt of possession of the drugs. As we shall demonstrate, the evidence which Roman claims not to have been considered by the trial court was inadmissible hearsay and, in any event, even assuming *arguendo* the admissibility of such hearsay, it in no way rebutted the ample reliable evidence presented by the Government that Roman possessed the narcotics.

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* Because Ignacia Rosario and Domingo Rosario share a common surname, they shall hereafter sometimes be referred to simply as Ignacia and Domingo.

A. The Recitation By Patrolman Daly Of Domingo Rosario's Purported Admission That The Drugs Found In The Apartment Belonged To Him Was Inadmissible Hearsay.

Over the Government's objection to the hearsay nature of his testimony, Patrolman Kevin Daly recounted a statement made to him by Domingo Rosario, Roman's stepson, "that the stuff that was in his [Domingo's] apartment was his and that . . . his mother, Ignacio [sic] Rosario, had nothing to do with it whatever." (Tr. 108). According to Roman, this statement was properly admitted into evidence as "circumstantial evidence of Domingo's state of mind" when he uttered it, which state of mind, or so the argument goes, "was probative of appellant's motivation in" admitting possession of the drugs. (Br. 10). The logic of this position is, to say the least, elusive.

Domingo's statement to Patrolman Daly was made after Domingo's arrest at a different location. What state of mind the statement reflected is hardly established by the testimony regarding it, nor is there any basis for concluding that Roman shared that motivation, whatever it was. Indeed, whether the statements by Domingo or Roman were false or even inconsistent with each other in no way appears from the trial record. The argument apparently is that outside the trial record there is evidence that Ignacia Rosario, wife and mother of Roman and Domingo respectively, had prior convictions, and that evidence that Domingo claimed the drugs were his gives rise to the inference that Domingo lied to protect her, which likewise supports the inference that Roman did the same. The chain of inferences is hardly compelling. In these circumstances, to say that because Domingo may have falsely admitted possession of the drugs, so too may have Roman is speculation of the rankest sort and nowise relevant to determination of Roman's guilt.

Moreover, the exception to the hearsay rule upon which this argument relies plainly does not authorize admission of this evidence, even if probative, for the purpose now claimed. *United States* v. *Murray*, 297 F.2d 812, 816 (2d Cir.), *cert. denied*, 369 U.S. 828 (1962); *Shepard* v. *United States*, 290 U.S. 96, 103-106 (1933).

Alternatively, Roman urges that Patrolman Daly's hearsay account of Domingo's supposed admission was properly admitted into evidence as a statement against penal interest. Historically, extrajudicial statements against penal interest by third parties have been inadmissible, *Donnelly* v. *United States*, 228 U.S. 243 (1913), while declarations against pecuniary or proprietary interest are admissible in evidence on the ground that they are inherently reliable. V WIGMORE, *Evidence* §§ 1455, 1476. This Court has repeatedly left open the question whether declarations against penal interest should be put in the same class as statements against pecuniary interest and admitted in evidence as exceptions to the hearsay rule. *E.g.*, *United States* v. *Marquez*, 462 F.2d 893, 895 (2d Cir. 1972); *United States* v. *McKee*, 462 F.2d 275, 278 (2d Cir. 1972); *United States* v. *Capaldo*, 402 F.2d 821, 824-825 (2d Cir. 1968), *cert. denied*, 394 U.S. 989 (1969); *United States* v. *Dovico*, 380 F.2d 325 (2d Cir.), *cert. denied*, 389 U.S. 944 (1967). In the Government's view, however, it is unnecessary to reach that question in this case.

Assuming *arguendo* that declarations against penal interest were admissible, three criteria would have to be met before a statement proferred under the exception could be admitted:

1. the declarant would have to be unavailable. *United States* v. *Jones*, 400 F.2d 134 (9th Cir. 1968), *vacated on other grounds*, 395 U.S. 462 (1969).

2. the declarant would have to be ". . . admitting a particular crime for which prosecution is possible at the time . . ." *United States* v. *Dovico*, *supra*, 380 F.2d at 327.

3. the statement would have to have been made under circumstances assuring its reliability. *United States* v. *Capaldo*, *supra*, 402 F.2d at 824-825.

The statement of Domingo Rosario proferred by Roman failed to meet the first and third criteria set out above. In the first place, there was absolutely no showing made below that Domingo Rosario was unavailable to testify on behalf of Roman at the trial.* Although Roman attempts to gloss over this absence of foundation for the introduction of Domingo's statement by reference to Domingo's then status as an indictee awaiting trial, in this Circuit the mere possibility that a witness may invoke the Fifth Amendment and decline to testify has been squarely rejected as a proper basis on which to find that the witness is "unavailable". *United States* v. *Sanchez*, 459 F.2d 100 (2d Cir.), *cert. denied*, 409 U.S. 864 (1972). Roman's attempted distinction (Br. 11n.) of the situation in the present case from that in *Sanchez* distorts the plain language of the *Sanchez* opinion almost beyond recognition. There this Court held that:

> "The only way adequately to establish unwillingness of a witness to testify is to compel the presence of the witness and to test the question before the Court.
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> * * * * *

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* Significantly, review of the trial transcript discloses that Domingo was present in the courtroom on the day of trial and that Roman's attorney was aware of this fact. (Tr. 54). In addition, of course, Domingo was Roman's stepson and, as such, one could properly expect him to have cooperated with his stepfather's defense.

> It was pure speculation on the part of counsel that Alonzo would refuse to testify if compelled to appear. Witnesses often attempt to avoid testifying by threatening to refuse and implying that if compelled they will give evidence unfavorable to the party compelling their appearance. When these measures fail they often give evidence." 459 F.2d at 102-103.

Similarly, it is the sheerest of guesswork by Roman's counsel here that Domingo was in fact an unavailable witness.*

Furthermore, Domingo's statement was clearly not made under circumstances assuring its reliability. Indeed, Roman's argument depends on the inference that Domingo made a false statement motivated by a desire to shield his mother from prosecution and/or conviction.** At the time he made the statement to Officer Daly, Ignacio Rosario was already in custody, and Domingo's remarks to Officer Daly were thus carefully tailored toward ab-

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* The authorities cited by Roman (Br. 11) on this issue do not indicate otherwise. Rule 804(a)(1) of the Federal Rules of Evidence requires that the unavailable witness be "exempted by ruling of the Court on the ground of privilege from testifying concerning the subject matter of his statement." Of course, the issue of Domingo's privilege was never submitted to the Court for a ruling. Likewise inapposite is *United States* v. *Mobley*, 421 F.2d 345 (5th Cir. 1970), where the Fifth Circuit held that the testimony at the first trial of a witness who steadfastly refused to testify at a retrial properly had been read into the record at the second trial.

** Although appellant asserts in his brief (at 11) that Domingo's statement would be admissible under the since enacted Federal Rules of Evidence, the applicable Rule, Rule 804(b)(3), even if satisfied as to the required unavailability of Domingo, would not authorize admission of the testimony because of its lack of trustworthiness.

solving her of guilt rather than confessing his own criminal wrongdoing.*

Thus, it was not error for Judge Duffy to ignore Daly's testimony about Domingo's statement purportedly exculpating Ignacia Rosario. See *United States* v. *Reeves*, 348 F.2d 469 (2d Cir. 1965), *cert. denied*, 383 U.S. 929 (1966); *United States* v. *Weldon*, 384 F.2d 772, 774 (2d Cir. 1967); *United States* v. *Schecter*, 475 F.2d 1099 (5th Cir.), *cert. denied*, 414 U.S. 825 (1973); *United States* v. *McCarthy*, 470 F.2d 222 (6th Cir. 1972); *United States* v. *Greathouse*, 484 F.2d 805 (7th Cir. 1973).**

B. Even Assuming *Arguendo* That Domingo's Statement To Patrolman Daly Was Admissible, Other Evidence In The Record Established Roman's Possession Of The Drugs Beyond A Reasonable Doubt.

In reviewing the sufficiency of the evidence after a bench trial, this Court has recently instructed that "the test . . . is whether upon the evidence, giving full play

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* Domingo's admission of ownership of the drugs was coupled with the assertion that "his mother . . . had nothing to do with it whatever" (Tr. 108). This latter quoted portion would be inadmissible even if Domingo's claim of ownership of the drugs were admitted under a penal interest exception. *United States* v. *McKee*, *supra*.

** Roman's argument (Br. 11) that he is entitled to a second opportunity to present Domingo's testimony in the event this Court finds Patrolman Daly's recitation of Domingo's statement to have been inadmissible is meritless. Having deliberately elected not to call Domingo as a witness in the first place, it is reckless for Roman now to state that a remand is required for this purpose. Furthermore, if in fact, as Roman claims, Domingo would have refused to testify on Fifth Amendment grounds had he been called as a witness at trial, Roman can hardly claim that his counsel was lulled by the admission of Patrolman Daly's testimony into believing that Domingo's testimony was unnecessary—counsel simply had no choice in the matter.

to the right of the trial judge to determine credibility, weigh the evidence, and draw justifiable inferences of fact, 'a reasonable mind might fairly conclude guilt beyond a reasonable doubt.'" *United States* v. *Freeman*, 498 F.2d 569, 571 (2d Cir. 1974). That test is certainly met in this case.

The only evidence in the record below which is in any respect even arguably inconsistent with Roman's possession of the drugs is Domingo's purported admission to being the owner of "the stuff that was in his apartment." (Tr. 108). Balanced against this must be Agent Sturn's testimony of Roman's offer to furnish him with an eighth kilogram of heroin, the testimony from two of the agents who executed the search warrant for Roman's apartment that on the morning of his arrest Roman twice acknowledged the narcotics and other material seized belonged to him, and the fact that quantities of heroin and cocaine were found on the bed table next to the bed in which the agents found Roman asleep and in a dresser drawer in Roman's bedroom.

To the extent that the testimony introduced by the defense was in any way at odds with the Government's theory of the case and the evidence presented by the prosecution witnesses, conflicts and discrepancies in the testimony were for the fact finder—here, Judge Duffy—to resolve. *United States* v. *Minor*, 398 F.2d 511, 512 (2d Cir. 1968). That he did so in a manner unsatisfactory to Roman is no ground for reversal. The District Court's finding that Roman possessed the drugs, despite the scant contrary evidence introduced by the defense,*

* The statement in the opinion below that "the defense did not call any witnesses" resulted no doubt from the fact that the only defense witness, Patrolman Kevin Daly, was also one of the officers who executed the search warrant for Roman's apartment and an individual who located several of the exhibits introduced by the Government at trial.

was not in the least irrational or arbitrary. Indeed, given the remarkably attenuated chain of inferences which Roman seeks to draw from a hearsay statement by Domingo which, by Roman's argument, must be assumed to have been a lie, it is not at all surprising that Judge Duffy made no reference to it.

Moreover, Domingo's admission of ownership was hardly inconsistent with Roman's admissions, inasmuch as Roman and his stepson could well have had a joint possessory interest in the narcotics in Roman's apartment.* Indeed, Roman's admission of ownership of the narcotics found strewn about his apartment was scarcely a crucial component of the Government's proof. See *United States* v. *Sisca*, 503 F.2d 1337, 1343 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974); *United States* v. *Vasquez*, 429 F.2d 615 (2d Cir. 1970). Furthermore, it appears in the trial record, *Domingo's* admission of ownership did not clearly refer to the drugs in Roman's apartment. Domingo referred to "the stuff that was in his [Domingo's] apartment," and Officer Daly testified that Domingo gave two addresses in addition to 1980 Second Avenue when asked his residence address. (Tr. 109). Considering this absence of persuasive evidence impeaching Roman's admissions to ownership of the con-

* Roman repeatedly suggests in his brief that the issue here revolves around "appellant's proprietary interest" and "appellant's assertions of ownership of the drugs" (Br. 8, 9). This is, of course, both inaccurate and misleading, since the charge here was possession, and ownership of the drugs, on these facts, was not a necessary element of the Government's proof.

traband, it is hardly surprising that the decision below failed explicitly to reject the meager evidence offered by the defense on the issue of possession.*

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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IRA H. BLOCK,
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* Although Roman would make much of the absence from the decision of any reference to the Daly testimony, defendant made no request for findings pursuant to Fed. R. Crim. P. 23(c). In his decision, Judge Duffy sought only to relate the evidence upon which his decision was based (A. 2). Manifestly, therefore, after weighing the conflicts in the evidence as to Roman's possession of the drugs and determining that Roman did in fact possess the narcotics, it was then unnecessary for him to recite in his decision evidence upon which his determination was *not* based.

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AFFIDAVIT OF MAILING

IHB:emw

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

IRA H. BLOCK being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 25th day of September, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

SHEILA GINSBERG, ESQ.
Federal Defender Services Unit
509 United States Court House
Foley Square
New York, New York L0007

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Ira H. Block

IRA H. BLOCK

Sworn to before me this

25th day of September, 1975

Jeanette Ann Grayer

JEANETTE ANN GRAYER
Notary Public, State of New ...
No. 24-1541575
Qualified in Kings Coun
Commission Expires March 30, 1977